It does not appear from the grounds stated by Ong Hock Thye F.J. for refusing leave to appeal that the attention of the Federal Court was drawn to *Ratnam* v. *Cumarasamy*.[3] That decision was on the basis that an appeal lay as of right from a final order coming within (a) (i). If so, the same must apply in relation to a final judgment or order coming within (a) (ii).

As the question raised on this application for leave may arise on other applications before the Federal Court, their Lordships think that it is desirable that they should express their views upon it. In their opinion *Ratnam* v. *Cumarasamy* [3] was decided on the right basis and an appeal lies as of right in cases which come within (a) (i) and (ii), provided of course that the appellant complies with any order that the court may make under section 75 or in relation to security. It appears to the board that the Federal Court only has discretion to refuse leave to appeal in cases which come within (a) (iii) and (b).

Although as Beadle C.J. pointed out in *Chikwakwata* v. *Bosman* [4] at p. 60 the word "leave" normally implies a discretion to give or withhold permission, the reference to leave in section 74 is a reference to section 75 and does not in the context imply such a discretion.

The granting of special leave to appeal by the Judicial Committee is a matter of discretion and not of right (*Davis* v. *Shaughnessy*,[5]) *per* Viscount Dunedin at p. 112. Their Lordships agree with the Federal Court in their conclusion that this case is not a fit one for appeal to the Judicial Committee and they do not consider that they should exercise their discretion by granting leave solely on account of the fact that the appeal was wrongly treated by the Federal Court as one in which that court had a discretion.

Whether or not it is desirable that the Federal Court should be given a discretion to refuse leave to appeal in cases which come within section 74 (1) (a) (i) and (ii) in order to protect respondents from having to incur heavy expense and suffer inconvenience when in the words of Ong Hock Thye F.J. "the appeal appears likely to receive short shrift in the Privy Council" is not a matter for their Lordships but for the Legislature.

For the reasons stated their Lordships have reported to the Head of Malaysia their opinion that the application for special leave be refused.

*Application refused.*

Solicitors: *Graham Page & Co.; T. L. Wilson & Co.*

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## MOHAMED v. COMMISSIONER OF LANDS & MINES, TRENGGANU & ANOR.

[F.C. (Azmi C.J. (Malaya), Ismail Khan and MacIntyre JJ.) February 5, 1968]

[Kuala Trengganu — Federal Court — Civil Appeal No. X. 51 of 1966]

*Administrative Law — Certiorari — Error of law on face of record — Excess of jurisdiction — Decision of tribunal "shall be final" — Whether subject to certiorari — Harta sapencharian — Trengganu Land Enactment, 1357, s. 60.*

*Malay Customary Law — Harta sapencharian laki bini — Claim for.*

This was an appeal against the order of the High Court at Trengganu dated June 12, 1966, ([1967] 1 M.L.J. 76), quashing the order of the Commissioner of of Lands and Mines dated December 22, 1964. By this order the commissioner had set aside an order of the Collector of Land Revenue, Kuala Trengganu, awarding the second respondent a half share in the land comprised in A.A. 457/55. The appellant after his marriage to the second respondent applied for and was granted the said piece of land in area about nine acres. It was jungle land. It was then cleared and planted with rubber. The appellant admitted the help in harvesting padi and transplanting rubber seedlings he received from his wife, but denied that she had any part in cultivating it. On January 11, 1959, about ten years after the marriage the second respondent was divorced. She then claimed under section 60 of the Trengganu Land Enactment for a half share in the land as *harta sapencharian*.

**Held,** dismissing the appeal: (1) there was no merit in the appellant's contention that there was a denial of the rules of natural justice;

(2) there was no miscarriage of justice, and, where there was no miscarriage of justice, there could be no excess of jurisdiction;

(3) the commissioner having found that the land was acquired during coverture and that the second respondent had contributed to its development the presumption arose that it was *harta sapencharian* which had not been rebutted. In denying the second respondent her share in the land the commissioner had acted on a principle unknown to the law.

*Cases referred to:—*

(1) *R.* v. *Northumberland Compensation Appeal Tribunal* [1952] 1 All E.R. 122.

(2) *Re Gilmore's Application* [1957] 1 All E.R. 796.

(3) *Chop Tong Yuen & Ors.* v. *The Asia Insurance Co. Ltd. & Anor.* (1956), 3 M.C. 62.

(4) *Roberts* v. *Ummi Kalthom* [1966] 1 M.L.J. 163.

(5) *Hajjah Sulong binte Abu Bakar* v. *Mamat bin Mat Amin*, Kuala Trengganu Civil Appeal No. 7 of 1951, unreported.

(6) *Hujah Lijah* v. *Fatimah* [1950] M.L.J. 63.

FEDERAL COURT.

*Dato' Abdullah bin Abdul Rahman* (*Vijayanathan* with him) for the appellant.

*Mohamed bin Yaacob* (State Legal Adviser) for the 1st respondent.

*A. Wilson* for the 2nd respondent.

*Cur. Adv. Vult.*

**Ismail Khan J.:** This is an appeal against the order of the High Court at Trengganu dated

12th June, 1966, quashing the order of the Commissioner of Lands and Mines dated 22nd December, 1964. By this order the commissioner had set aside an order of the Collector of Land Revenue, Kuala Trengganu, awarding the second respondent a half share in the land comprised in A.A. 457/55.

The story goes back to the time when the appellant after his marriage to the second respondent applied for and was granted the said piece of land in area about nine acres. It was jungle land. It was then cleared and planted with rubber.

On 11th January, 1959, about ten years after the marriage, the second respondent was divorced. She then claimed under section 60 of the Trengganu Land Enactment a half share in the land as *harta sapencharian.*

At the enquiry before the collector evidence was taken from the second respondent and her four witnesses and from the appellant. It is not easy to unravel the facts disclosed in the evidence. I cannot too strongly impress upon those holding such inquiries to have clearly before them the issues involved. In this case, the claim is for *harta sapencharian laki bini.* The parties are illiterate peasants, and it is the duty of the collector to direct the evidence to the issue before him and to check the tendency of the witnesses to range over matters which have no bearing on the case. However, it is possible, out of the disjointed statements in the record, to sift certain facts.

The land was jungle land at the time of its alienation to the appellant. According to the second respondent, she helped to clear the land with the appellant and thereafter assisted him in planting it with rubber. The trees were in tapping at the time of the divorce. Her evidence was substantially corroborated by her witnesses.

The appellant admitted that he applied for the land after his marriage to the second respondent. Except for some help in harvesting padi and transplanting rubber seedling, he denied that she had any part in cultivating it.

In the event, the collector decided in favour of the second respondent's claim. Against this order the appellant appealed to the commissioner under section 138(i) of the Enactment which reads:—

"Any party dissatisfied with any decision made by a collector as registrar or otherwise in matters arising under this Enactment may, if no other appeal is specially prescribed and unless it is prescribed that the decision of the collector is final, appeal to the commissioner within a period of one month from the date of such decision and on payment of the prescribed fee, and the decision of the commissioner shall be final."

At the hearing of the appeal the commissioner proceeded to record further evidence from the parties. The commissioner reversed the order of the collector. The second respondent then applied to the High Court to quash by *certiorari* this order of the commissioner.

The writ of *certiorari* is an ancient remedy and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. This control over such bodies is exercised not in an appellate but in a supervisory capacity. The judgment of Denning L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal* [1] contains an interesting account of the development of this procedure of *certiorari* and its application in respect of convictions by magistrates, the orders of justices in civil matters, awards of arbitrators and statutory tribunals. More use is made of such remedy with the advent of new statutory tribunals especially where in the case of some of these it is provided that their decision is final. As Romer L.J. said in *Re Gilmore's Application* [2] at p. 803:—

"I cast no reflection whatever on tribunals such as that in the present case and they do their work conscientiously and with efficiency. In the nature of things, however, these and similar inferior tribunals (and there are many of them nowadays) are bound to go wrong from time to time in matters of law. Their members consist, in the main, of people who have devoted their lives to activities far removed from the study and practice of the law; and neither by training nor by experience can they be expected to have that knowledge of principles of construction which is so necessary for the proper understanding and application of the various statutes and regulations which often come before them. . . . It is not in the public interest that inferior tribunals of any kind should be ultimate arbiters on questions of law."

Under section 138(i) of the Enactment it is provided that the decision of the commissioner on an appeal from the collector is final. The effect of the words that the decision of a statutory tribunal "shall be final" was considered in the above case. There, the applicant in 1936 lost the sight of his right eye and in 1955 he lost his left eye in an industrial accident and became entitled to disablement benefit under the National Insurance (Industrial Injuries) Act, 1946. Under regulation 2(5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, his disablement was to be assessed as if the injury to his right eye was incurred as a result of losing the sight of his left eye; and, under schedule 1 to the regulations, the disablement for blindness in one remaining eye was to be assessed in such circumstances at one hundred per cent. A medical appeal tribunal failing to apply regulation 2(5), assessed the applicant's disablement at twenty per cent. Section 36(3) of the Act of 1946 provides that any decision of a medical appeal tribunal on a question arising under the Act "shall be final". Denning L.J. said in the same case at page 801:—

"Do those words preclude the court of Queen's Bench from issuing a *certiorari* to bring up the decision? This is a question which we did not discuss in *R.* v. *Northumberland Compensation Appeal Tribunal* because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the

remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to *certiorari*'. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record."

and again at page 803 the same learned judge said:—

". . . . I am glad to notice that modern statutes never take away in express words the right to *certiorari* without substituting an analogous remedy."

Apart from excess of jurisdiction or error of law on the face of the record, *certiorari* could lie on grounds of:—

(1) bias on interest, where persons having a direct interest in the subject matter of the inquiry take part in adjudicating upon it;

(2) breach of rules of natural justice;

(3) fraud and perjury;

(4) decision given in proceedings improperly brought before an inferior tribunal; (See *Halsbury*, 3rd ed. vol. 11, page 144, paragraph 272).

In the present case the grounds for the application are:—

(1) denial of the rules of natural justice;

(2) excess of jurisdiction;

(3) error of law on the face of the record.

There is clearly no merit in the first ground.

As to the second ground, it was contended that the commissioner in hearing further evidence from the parties had exceeded his jurisdiction. As the learned judge rightly pointed out, the commissioner was within his powers in hearing the appeal and nothing arose in the course of the hearing to oust his jurisdiction. Unlike section 60, section 138(i) contains no detailed provisions regulating the procedure relating to the appeal. Section 141 of the Enactment empowers the Sultan-in-Council to make rules to provide for the procedure to be followed under any section of the Enactment. No such rule appears to have been made in respect of section 138(i). There is nothing then in the section empowering the commissioner to take further evidence. However, the evidence before the commissioner does not differ materially from that recorded by the collector. There was no miscarriage of justice, and, where there was no miscarriage of justice, there could be no excess of jurisdiction. In the case of *Chop Tong Yuen & Ors.* v. *The Asia Insurance Co. Ltd. & Anor.*,[3] it was held that where a statutory tribunal does something in a way not specifically authorised by statute, and no question of miscarriage of justice arises, there is nothing in the authorities to say that there is an excess of jurisdictcion.

As regards the last ground, the learned judge found that there was an error of law on the face of the record and granted the order for *certiorari.*

The appellant sets out various grounds of appeal which overlap. There are actually only two grounds. One is the objection that the learned judge was wrong in holding that the commissioner could not record further evidence in an appeal from the decision of the collector. I have already dealt with this point and in the result, in my view, it is only necessary to consider the other grounds wherein the appellant attacks the finding of the learned judge that there was an error of law on the face of the record. It appears from the record that the commissioner having heard the evidence which was substantially the same evidence before the collector found that, and I quote, "whatever money paid for the cost of the land when it was first alienated to the appellant was the money given him by the second respondent out of the savings the appellant kept with the second respondent". He also found that the appellant did assist in clearing the land and planting it with rubber.

It is clear from the authorities which were reviewed in the latest case of *Roberts* v. *Ummi Kalthom*,[4] at least as regards the Malay peasantry, that there is a presumption that immovable property acquired during coverture out of the joint resources or joint efforts of husband and wife is *harta sapencharian.* The presumption can be rebutted by evidence that the land is acquired by the sole efforts or resources of the husband. The divorced spouse would be entitled to a share which may vary from State to State, but the trend of recent decisions is in favour of a half share for each spouse. However, in the State of Trengganu the position is covered by authority. In the unreported case of *Hajjah Sulong binti Abu Bakar* v. *Mamat bin Mat Amin*,[5] Kuala Trengganu Civil Appeal No. 7 of 1951, it was held that the divorced wife was entitled to a half share as her *harta sapencharian.*

In the instant case, it is true that the commissioner had held that the land was paid for out of the sole resources of the appellant. But as Briggs J. observed in the case of *Hujah Lijah binti Jamal* v. *Fatimah binti Mat Diah*,[6] in regard to property acquired during the subsistance of the marriage, the acquisition "may extend to cover mere enhancement of value by reason of cultivation or development". So, although the appellant had paid for the land it was still jungle at the time of its alienation to him. It was the combined labours of both the second respondent and the appellant in planting it with rubber that turned the land into a small estate which was in full production at the time of the divorce. The commissioner having found that the land was acquired during coverture and

that the second respondent had contributed to the development of the land, the presumption arose that it was *harta sapencharian.* This presumption had not been rebutted. The commissioner however decided to exclude the second respondent from any share therein for reasons set out in his judgment. I quote:—

"During the period of the appellant and the respondent living as husband and wife the respondent did not at any time ask the appellant as to the ownership of the land when it was first alienated to the appellant nor did the respondent ask the appellant as to whether by assisting the appellant in planting rubber on the land should be jointly held by them as registered co-proprietors of the land.

The question in issue in this case is that whether a wife by doing something for or giving assistance voluntarily to a husband is entitled to a share of the land. It is my conviction that it is customary for a wife to assist a husband in the hope that they can settle down peacefully during their stay as wife and husband not of course in expectation of something to be given to the wife when divorced except matters governed by the religious principles."

The fact that:—

(i) the second respondent never questioned the appellant about the ownership of the land;

(ii) she did not ask him if she would be entitled to a share therein by helping in developing the land;

(iii) she only voluntarily assisted in cultivating the land,

is irrelevant to a claim by the second respondent for a share in the *harta sapencharian.* The point of importance is whether the land was acquired during coverture and if the second respondent assisted in working it. These facts the commissioner found in favour of the second respondent. In denying her her right to her share in the *harta sapencharian* for the reasons given above, the commissioner had acted on a principle unknown to the law and had therefore fallen into error in point of law. In the case of *R.* v. *Northumberland Compensation Appeal Tribunal,* Denning L.J. said at page 131:—

"If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision".

The appeal is dismissed with costs here and in the court below.

**Azmi C.J. (Malaya):** I have had the advantage of reading the judgment of my brother Ismail Khan J. in the above appeal and I am in entire agreement with it.

**MacIntyre J.:** I have had the advantage of reading the judgment of my learned brother Ismail Khan J. in the above appeal and I am in entire agreement with it.

*Appeal dismissed.*

Solicitors: *Dato' Bijaya & Co.; Wilson & Co.*

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## WONG SIN YEOW v. PUBLIC PROSECUTOR

**[A.Cr.J. (Wan Suleiman J.) February 13, 1968]**
**[Kota Bharu — Criminal Appeal No. 19 of 1967]**

*Criminal Procedure — Plea of guilty by unrepresented accused — When plea may be withdrawn — Court when functus officio — Judicial discretion.*

The appellant was charged with the offence of housebreaking by night. He pleaded guilty and was convicted for the offence, but sentence was deferred at the request of the prosecution. When the appellant later appeared for sentence, he was represented by counsel who informed the court that his client wished to withdraw the plea of guilty. The magistrate refused to permit the plea to be withdrawn and the appellant was accordingly sentenced.

**Held,** dismissing the appeal: (1) the magistrate was *functus officio* after having recorded a conviction against the appellant and therefore he could not permit the plea of guilty to be withdrawn;

(2) alternatively even if the magistrate was not *functus officio* the discretion rested in a magistrate to allow an accused person to withdraw his plea of guilty should be exercised judicially and for valid reasons. In this case the fact that the accused was unrepresented by counsel or that it was not stated in the statement of facts made by the prosecuting officer that the complainant could or could not identify the appellant could not detract from the validity of his plea of guilty.

*Cases referred to:—*

(1) *Public Prosecutor* v. *How Kim Kok* [1940] M.L.J. 16, distinguished.

(2) *Public Prosecutor* v. *Yusoff* [1964] M.L.J. 264.

(3) *Yeo Sim Huat* v. *Public Prosecutor* [1961] M.L.J. 328.

(4) *Abdul Mormin* v. *Public Prosecutor* [1939] M.L.J. 323.

(5) *Public Prosecutor* v. *Sam Kim Kai* [1960] M.L.J. 265.

CRIMINAL APPEAL.

*A. Wilson* for the appellant.

*Wan Ismail* (Deputy Public Prosecutor) for the respondent.

**Wan Suleiman J.:** The appellant was charged with the offence of house breaking by night, the charge being as follows:—

"That you on 26.12.66 at about 1.00 a.m. at house No. 3654, Jalan To'Hakim, Kota Bahru, in the District of Kota Bahru, in the State of Kelantan, committed house breaking by night, to wit by entering the said dwelling house of one Mr. Lye Tong Meng, and that you have thereby committed an offence punishable under section 456 of the Penal Code."

When the case came up for hearing on 15th April 1967, the appellant on being charged pleaded guilty. There is a note by the learned magistrate to the effect that the appellant understood the nature and consequences of his plea and intended to admit without qualification the offence which he had been charged. It would not be unreasonable to conclude therefore that the learned magistrate had satisfied himself that there was no doubt on that score.

There then followed the usual narration of the facts of the case by the prosecuting officer which is to the following effect:—